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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CLINTON FORBEL THINN, Defendant and Appellant.	D074397 (Super. Ct. No. SCD270553)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Cohen Butler and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Lyle W., a Black inmate at San Diego Central Jail, was strangled from behind by one of his cellmates. Evidence linked defendant Clinton Forbel Thinn, a White inmate originally from New Zealand, to the crime. Thinn did not testify at trial but sought to show that he acted in self-defense by

proffering evidence of racial tensions at the jail. The trial court excluded this evidence, finding it supported only a speculative inference as to Thinn's state of mind, and it did not instruct the jury on self-defense or imperfect self-defense. The jury ultimately convicted Thinn of first degree murder, and the court sentenced him to 25 years to life in state prison.

On appeal, Thinn challenges the exclusion of evidence regarding jailhouse race politics and the court's failure to instruct on perfect or imperfect self-defense. Because evidence of racial politics at Central Jail would support only a *speculative* rather than reasonable inference that Thinn acted in self-defense, the trial court properly excluded the proffered evidence. Likewise, because no substantial evidence supported either theory, no instruction on self-defense or imperfect self-defense was required. Rejecting both claims of error, we further reject Thinn's cumulative error claim and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Clinton Thinn was placed in cell 4 of module 5-B of Central Jail on November 21. Victim Lyle W. became his cellmate two days later. At 1:49 a.m. on the morning of December 3, inmate L.F. joined them. When L.F. arrived, it seemed that Thinn and Lyle were getting along. Lyle was talkative and was describing a collage he was making, while Thinn looked on. L.F. offered Lyle a small amount of methamphetamine that he had snuck into the jail and promptly went to sleep on the bottom bunk. Sometime later, Lyle woke L.F. to ask whether he and Thinn could have the rest of L.F.'s methamphetamine. L.F. asked if they could get him coffee in the morning, and Lyle said they would try. L.F. then gave the remainder to Lyle and returned to sleep. When he awoke, Lyle was unresponsive on the floor, and deputies were at the cell door.

Module 5 was under lockdown all morning on December 3, meaning inmates could not leave their cells. Deputies delivered medication for Lyle that morning. A hard count taken around noon indicated that all inmates were accounted for and in their cells. San Diego County Sheriff's Deputy Trevor Newkirk observed nothing unusual during his hard count—Thinn and Lyle seemed to get along like normal cellmates. Deputy Matthew Charlebois agreed, recalling that Thinn and Lyle "appeared to be talking and almost kind of laughing with each other."

At 12:55 p.m., Thinn pressed the intercom button in cell 4, sending a signal to the tower overlooking the entire fifth floor. Deputy Charles Delacruz listened as Thinn asked for a nurse to check his cellmate's vitals. Delacruz logged a "man down" call, paging colleagues to the scene. Deputy Charlebois was the first to arrive at cell 4. He saw Thinn standing over Lyle's feet, staring toward both Lyle and the cell door with a "1,000 yard stare." Thinn seemed out of breath, was breathing heavily, and had red marks on his shirtless chest and stomach area. Deputy Newkirk arrived around that same time to find Lyle lying prone, face down, with his head near the cell door. He too described Thinn as standing in the middle of the cell, looking toward Lyle. Thinn was shirtless, out-of-breath, and appeared flush or red in the face. Newkirk described his expression as akin to a deer in headlights, eyes wide with surprise.

L.F. was laying in the bottom bunk when Newkirk opened the cell. He was fully clothed and had apparently been sleeping. Unlike Thinn, L.F. was neither flushed nor out of breath; he seemed confused when escorted out. Newkirk removed L.F. and Thinn to seek medical assistance for Lyle. As Thinn waited in the holding area, Deputy Christopher Simms observed him pacing the room for fifteen to twenty minutes, periodically staring at Simms

with wide eyes and sitting down on a table. Deputy Curtis Stratton described Thinn's torso as appearing flush during this time, as if he had just been exercising. He was breathing heavy and had shaky hands and blood around his fingernails. The forensic evidence technician took photographs of blood in the nail bed of Thinn's left thumb and purple discoloration in the tops of his knuckles. DNA analysis later tied the blood found on Thinn's thumbnail to Lyle.

Lyle was transported to the hospital but never regained consciousness. He died a week later when his family removed him from life support. Given reports that there had been an altercation at the jail, Lyle's father examined his son's hands but saw nothing other than bruising on Lyle's face. The autopsy concluded that Lyle died by homicide from ligature strangulation. Petechiae, or tiny hemorrhages, in Lyle's eyes were consistent with asphyxiation, and there was bruising and bleeding in his mouth. The medical examiner identified a linear scab on Lyle's neck. Because there were no ligature marks on the back of Lyle's neck, it was likely that the ligature was applied with more force or friction to the front. Deputy Stratton explained that the red mark on the front of Lyle's neck looked almost like a necklace had been ripped off of him from behind. Although the medical examiner could not determine how long the ligature had been applied to Lyle's neck, she explained that it typically takes anywhere from a few minutes to ten minutes for strangulation to cause irreversible brain damage.

A thorough search of the cell revealed a piece of blue fabric, potentially fashioned from jail garments, in the toilet. The medical examiner believed it was possible that the mark on Lyle's neck had been formed by the piece of fabric found in the toilet. Inmates at San Diego Central Jail receive one set of jail-issued clothing per week, consisting of a blue shirt and pair of pants

and undergarments. L.F. was fully clothed when deputies arrived. Lyle and Thinn were both shirtless. One blue shirt was found hanging in the cell, but it was not ripped or torn in any manner to be linked to the fabric from the toilet. A careful search did not reveal any torn pieces of blue clothing or torn sheets in the cell that could be linked to the torn fabric in the toilet.

The San Diego County District Attorney charged Thinn with first degree murder. During pretrial motions in limine in Thinn's first trial, Judge Frederick Maguire ruled that he would allow the defense to present expert testimony by Francisco Mendoza, who would explain racial divisions and politics in San Diego Central Jail. The court explained that it had no problem admitting general testimony by Mendoza indicating a hostile racial environment at the jail, but the extent of Mendoza's testimony would be limited based on evidence already in the record as to whether *Thinn* was vulnerable, alone, or the victim of racial politics. As was apparent to the jury in both trials, Thinn was White, while Lyle and L.F. were Black.

On January 25, 2018, prospective jurors saw Thinn in handcuffs during jury selection, prompting a mistrial. With a new jury empaneled, trial continued before Judge Maguire. The prosecution argued that the nature of the killing—ligature strangulation from behind for some number of minutes—supported a finding of premeditated and deliberated murder. Thinn in turn argued perfect or imperfect self-defense.

Viewing a video of breakfast service from another day, a drug treatment expert testified for the defense that Lyle's random movements were consistent with methamphetamine use. A psychiatrist opined that methamphetamine use is associated with unpredictable and irrational violence. Inmate Clyde M. testified that immediately after the incident, Thinn yelled, "man down" through the vents, asking for help. A defense

investigator who observed Thinn's hands more than a year after the incident described them as naturally purplish in color.

But the heart of the defense focused on Thinn's vulnerability as a foreigner. Inmate Mario L. explained that although module 5-B was designed as a race-neutral incentive module, racial tensions remained. Thinn was an outsider; people took advantage of him by raiding his commissary. Alexander W. explained that racial politics were widespread in module 5-B. Thinn was obviously a foreigner, spoke with an accent, and "didn't seem to fit in anywhere." He kept to himself whereas Lyle was the opposite, ordering other inmates around. Lyle seemed to bully Thinn by taking his food without permission. Taking food in jail is "a very big deal" and "could have severe consequences." When someone of a different race steals an inmate's food, a failure to protect oneself could precipitate a race riot.

Expert Francisco Mendoza then took the stand. He explained that foreigners are isolated at Central Jail; lacking a defined race category, they become targets for violence, demands for sexual favors, or demands for commissary as "rent" for protection. Stealing another inmate's food was a serious matter and could escalate to violence or death. Mendoza explained that Thinn's behavior in the jailhouse breakfast video was unusual. He waited until all other inmates finished eating to leave his cell. This behavior suggested to Mendoza that Thinn felt isolated, without anyone to back him up. By contrast, Lyle appeared neither vulnerable nor isolated; he was the first one out for breakfast and appeared like a jail "regular."

Judge Maguire decided to instruct the jury on self-defense and imperfect self-defense. Although he did not find the defense evidence compelling, the theories were within the realm of possibilities that a rational jury could accept. Sure enough, a second mistrial was declared after the jury

failed to reach a verdict. Jurors hung on degree—five found first degree murder, two found second degree murder, and five found voluntary manslaughter.

A third jury was empaneled for a second trial, which began in June 2018 before Judge Leo Valentine, Jr. During motions in limine, the court pressed defense counsel to identify the *evidence* it claimed supported its self-defense theory. Defense counsel explained his intent to show that Thinn was being bullied and, given jailhouse race politics, felt isolated as a foreigner. Counsel suggested that Thinn was defending himself from Lyle's methamphetamine-induced attack.

The court found this proffer speculative—that Lyle may have taken methamphetamine did not support a nonspeculative inference that he attacked Thinn on December 3. Moreover, experts could not testify about jailhouse race relations absent any indication those dynamics were at play when Lyle was strangled. Thinn could show that he was bullied by Lyle, though the court cautioned that this might support premeditation. But there would be no expert or percipient witness testimony on jailhouse race relations. When pressed by defense counsel, the court explained that although various things *could* have happened in the cell, racial dynamics only supported a speculative inference as to what actually happened unless there was something more to suggest that Lyle attacked Thinn in the cell because of his race.

Given the court's evidentiary rulings, Thinn's second trial was considerably shorter than his first. The prosecution's case remained the same—the nature of the strangulation from behind for some number of minutes supported a finding of premeditated and deliberated first degree murder.

Near the end of the prosecution's case-in-chief, the parties held an extended discussion as to whether the jury would be instructed on self-defense. Arguing the red marks on Thinn's chest were consistent with a struggle, defense counsel maintained self-defense instructions were supported by the evidence. He reiterated his view that evidence of racial dynamics at Central Jail, bullying by other inmates, and the effects of Lyle's methamphetamine use would support a claim of self-defense, but complained that this proffer had been precluded. The court disagreed—bullying evidence had not been excluded, but jailhouse politics "provides fodder for speculation" without giving jurors any evidence of what happened in the cell. As the court explained, self-defense requires some information about a defendant's state of mind, and all the evidence sought to be introduced by the defense did not support any nonspeculative finding in that regard. Based solely on the prosecution's evidence of red marks on Thinn's chest, there was insufficient evidence for a self-defense instruction.

Ultimately, the defense examined a single witness at the second trial, investigator Tanya Kunz. As she did in the first trial, Kunz explained the purple marks found on Thinn's knuckles by deputies on the day of the incident: Thinn's hands appeared purple in their ordinary course. Although the defense subpoenaed Clyde M. to testify that Thinn cried out for help, he did not appear and could not be found.

At the close of trial, defense counsel pressed for an instruction on voluntary manslaughter based on a heat of passion theory. The court refused the request, explaining there was no evidence of a motive or disagreement to support a nonspeculative theory that Lyle had been killed in a heat of passion. The jury was instructed on first degree premeditated and

deliberated murder and second degree malice murder. It was not instructed on voluntary manslaughter, self-defense, or imperfect self-defense.

During closing arguments, defense counsel argued there was no evidence of premeditation or deliberation to support a conviction for first degree murder, as Thinn and Lyle had been laughing just 40 minutes before the homicide. Rejecting this argument, the jury convicted Thinn of first degree murder. The trial court sentenced him to 25 years to life in state prison.

DISCUSSION

Thinn raises two related arguments on appeal. First, he claims evidentiary error occurred when the court excluded evidence of jailhouse race politics that was offered to show that he acted in self-defense or imperfect self-defense in strangling Lyle. Pointing to the vastly different evidence admitted in the two trials and the different outcomes, Thinn argues that excluding this evidence was prejudicial. Second, Thinn contends the court committed instructional error by failing to instruct the jury on perfect or imperfect self-defense. Rejecting both claims, we likewise do not accept Thinn's argument that cumulative error occurred.

1. *Exclusion of Jailhouse Racial Politics Evidence*

At his first trial, Thinn introduced testimony by inmates Mario L. and Alexander W. about race relations in module 5-B and patterns of bullying between Lyle and Thinn. He also introduced testimony by expert Francisco Mendoza to explain how being a foreigner left him exposed and vulnerable. In the second trial, Judge Valentine permitted the defense to introduce evidence that Thinn was being bullied, but excluded evidence regarding jailhouse racial politics. Although Thinn challenges this ruling on appeal, we conclude no error occurred.

Only relevant evidence is admissible (Evid. Code,[1] § 350)—that is, evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Evidence that leads only to speculative inferences is irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.) Mindful that trial courts have broad discretion to determine relevancy of evidence, error will be found only if a court "acted in an arbitrary, capricious, or patently absurd manner." (*People v. Jones* (2013) 57 Cal.4th 899, 947.)[2]

Because the racial tension evidence was offered to show self-defense, understanding the components of that theory is critical to evaluating its relevance. "Self-defense is *perfect* or *imperfect*. For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.] A killing committed in perfect self-defense is neither murder nor manslaughter; it is justifiable homicide." (*People v. Randle* (2005) 35 Cal.4th 987, 994.) Although a person acting in *imperfect* self-defense "also actually believes he must defend himself from imminent danger of death or great bodily injury,"

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1 Unless otherwise indicated, further statutory references are to the Evidence Code.

2 Thinn cites section 352 and maintains that application of this statute "must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) His argument, however, misconstrues the record. The court did not deem the jailhouse race politics *relevant* but nonetheless exclude it under section 352 as necessitating an undue consumption of time. Rather, it concluded the evidence supported only a *speculative* inference as to what happened in the jail cell and therefore excluded it on relevancy grounds. Because we agree with this analysis, we need not consider whether its exclusion was separately appropriate under section 352.

that belief is *unreasonable*. (*Ibid.*) "Imperfect self-defense mitigates, rather than justifies, homicide; it does so by negating the element of malice." (*Ibid.*; see *People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).)

"The subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the appellant must actually believe in the need to defend himself against imminent peril to life or great bodily injury." (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262 (*Viramontes*).) "If the trier of fact finds the requisite belief in the need to defend against imminent peril, the choice between self-defense and imperfect self-defense properly turns upon the trier of fact's evaluation of the reasonableness of appellant's belief." (*Ibid.*)

Thinn elected not to testify. His cellmate L.F. was the only other potential witness, but he was asleep the entire time. Although Thinn is correct that a defendant's testimony is not always required to show self-defense (see *Viramontes*, *supra*, 93 Cal.App.4th 1256; *People v. Ororpeza* (2007) 151 Cal.App.4th 73, 82 (*Oropeza*)), the circumstances of *this case* likely required such testimony. Without it, there was no *evidence* of Thinn's actual state of mind. Absent some indication of what occurred in cell 4 on December 3, there was no basis for the jury to believe that Lyle threatened or attacked Thinn. Nor is there any rational basis for a jury to find that Thinn actually believed in the need to defend himself against imminent danger of death or great bodily harm when he strangled Lyle from behind. Any inference as to Thinn's state of mind is *speculative*: with no evidence to moor it, testimony that racial politics were rampant in module 5-B or that Thinn as a foreigner was particularly vulnerable would only support a speculative, rather than reasonable, inference as to what happened in cell 4 on December 3. Speculative evidence is properly excluded on relevancy grounds. (See

People v. Babbitt (1988) 45 Cal.3d 660, 682 [" 'The inference which defendant sought to have drawn from the [proffered evidence] is clearly speculative, and evidence which produces only *speculative* inferences is *irrelevant* evidence.' "].)[3]

Thinn's authorities do not suggest otherwise. In *Viramontes*, two defense witnesses "testified they saw someone shoot at [defendant] first." (*Viramontes*, *supra*, 93 Cal.App.4th at p. 1263.) Supporting their account was "undisputed forensics evidence establishing the use of two guns" and witness accounts of "a pause between the first shot and subsequent shots." (*Ibid*.) Likewise, in *People v. Minifie* (1996) 13 Cal.4th 1055 (*Minifie*), the defendant testified that he shot in the victim's direction because he thought the victim was reaching for his crutches to hit him over the head. (*Id.* at pp. 1063–1064.) Expert testimony regarding battered women's syndrome was admissible to explain the reasonableness of the defendant's actions in *People v. Humphrey* (1996) 13 Cal.4th 1073, where the defendant testified to shooting her intimate partner because she thought he was reaching for a gun to shoot her. (*Id.* at p. 1080.) And evidence that the victim had heroin in his system was admissible to corroborate claims of erratic behavior in *People v. Wright* (1985) 39 Cal.3d 576, where in prior statements and trial testimony the defendant stated the victim had threatened him and was reaching toward his back pocket for what the defendant believed to be a weapon. (*Id.* at pp. 581–582, 583–584.)

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[3] Indeed, the foundation was far weaker at the second trial, where the defense chose not to examine fellow inmates Mario L. and Alexander W. about Lyle's bullying of Thinn. Far from suggesting any underlying tension between inmates, the only evidence presented at the second trial showed that Lyle and Thinn seemed to get along.

Thinn relies heavily on *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, but there too, the evidence supported a rational jury finding that the defendant was in fear when he stabbed the victim. Defendant Sotelo-Urena, a homeless man, was on trial for the murder of Nicholas Bloom, another homeless man, who he stabbed 70 to 80 times with a large kitchen knife. (*Id.* at p. 740.) Although Sotelo-Urena did not testify at trial, the jury heard recordings of two police interviews. (*Id.* at p. 737.) In them, Sotelo-Urena said he was sitting on the library steps at night reading when Bloom approached him and aggressively asked for a cigarette. When Sotelo-Urena replied that he did not have one, Bloom moved in as if to fight. Sotelo-Urena was pretty sure Bloom was one of the people who had attacked him in the past, and when Bloom reached to grab something from his pocket or waistband, he assumed Bloom was grabbing a knife. Perceiving he was in danger yet again, Sotelo-Urena grabbed a kitchen knife from his backpack and told Bloom to get away. But Bloom just laughed like he wanted to hurt Sotelo-Ureno, prompting the latter to respond to the threat. (*Id.* at pp. 737–738.) Other evidence at trial demonstrated that Sotelo-Urena waited for police to arrive, told responding officers that Bloom was trying to kill him, and showed them the kitchen knife he had used to stab him. (*Id.* at pp. 739–740.) The jury likewise heard evidence that Bloom had injected a large amount of methamphetamine was acting aggressively before he was stabbed. (*Id.* at p. 737.)

Against this backdrop, Sotelo-Urena proffered expert testimony of a retired judge who would explain the effects of increased victimization and risks of violence faced by the chronically homeless. (*Sotelo-Urena*, *supra*, 4 Cal.App.5th at pp. 741–742.) Based on local and national studies, the defense expert "was prepared to testify that the vulnerability to violence

experienced by homeless people tends to create a greater than normal sensitivity to perceived threats of violence." (*Id.* at p. 742.) The exclusion of the homelessness evidence on this record was error—the expert testimony was probative both of the defendant's actual belief in the need to defend himself and the reasonableness of that belief. (*Id.* at pp. 750, 752.) It was also probative of the defendant's credibility—i.e., whether the jury should believe Sotelo-Urena's statements to police. (*Id.* at p. 752.)

It is not enough to say, as Thinn argues, that the "jailhouse-politics evidence here was analogous to the homelessness evidence in *Sotelo-Urena*." While the two types of evidence may share some similarities, their admissibility turns in each case on the presence of foundational facts. Where, as here, there is no evidence regarding the circumstances of the attack, contextual evidence only invites speculative rather than reasonable inferences as to Thinn's state of mind. Thus, it cannot be said to have a tendency in reason to prove a disputed material fact. (§ 210.)

In summation, to prove his or her own frame of mind to argue self-defense, a defendant is entitled to corroborate testimony that he or she was in fear of peril by proving the reasonableness of such fear. (*Minifie*, *supra*, 13 Cal.4th at p. 1065.) A defendant may likewise offer contextual evidence to help the jury understand the situation from his or her perspective. (*Sotelo-Urena*, *supra*, 4 Cal.App.5th at p. 745.) But without direct or circumstantial evidence suggesting the defendant *was* subjectively in fear at the time he killed, corroborating testimony lacks foundation and cannot be admitted on its own to prove that ultimate fact. General evidence of jailhouse racial tensions supported at best a speculative inference as to what might have happened in cell 4 on December 3. Absent some evidence that Lyle attacked Thinn, or that Thinn was subjectively fearful of such an attack, this evidence

was inadmissible to support a defense theory of perfect or imperfect self-defense.

2. *Self-Defense Instructions*

Thinn next raises a related claim of instructional error. Toward the close of the prosecution's case-in-chief, the parties discussed jury instructions. The court stated that CALCRIM No. 505 (Self-Defense) was "just in there so it can be taken out, but at the present time, the evidence does not support [it]." Defense counsel interjected that red marks on Thinn's chest were sufficient "for a juror to draw a conclusion that a fight occurred and that Mr. Thinn was acting in self-defense." After an extended discussion revisiting the exclusion of jailhouse racial politics evidence, the court disagreed—evidence of red marks on Thinn's chest was insufficient to support an instruction on self-defense.

On appeal, Thinn contends the trial court erred by failing to instruct the jury on self-defense and imperfect self-defense.[4] In addition to red marks on his body "suggesting a physical struggle," Thinn points to evidence that he pressed the intercom in cell 4 to seek medical assistance for Lyle. Moreover, he argues that surveillance video informed jurors "that the jail was generally segregated by race, that Thinn was a White inmate in a cell with two Black inmates, and that a deputy who worked at the jail found this fact remarkable." Relying again on *Viramontes*, *supra*, 93 Cal.App.4th 1256,

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[4] Although counsel only objected to the omission of instructions on self-defense, Thinn maintains the court had a sua sponte duty to instruct jurors on imperfect self-defense. "A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense." (*Simon*, *supra*, 1 Cal.5th at p. 132.) Voluntary manslaughter based on imperfect self-defense is an uncharged lesser offense of first degree murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Thinn argues instructions on perfect and imperfect self-defense were warranted notwithstanding his decision not to testify.

"We review a trial court's decision not to instruct on perfect self-defense or imperfect self-defense de novo." (See *Simon, supra,* 1 Cal.5th at p. 133; *People v. Waidla* (2000) 22 Cal.4th 690, 733.) No instructions on either theory are warranted "absent substantial evidence to support them." (*People v. Stitely* (2005) 35 Cal.4th 514, 551 (*Stitely*).) In reviewing the evidence supporting an instruction, we construe the record in the light most favorable to the defendant. (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1483.) As we explain, no error occurred.

For both perfect and imperfect self-defense, a defendant must actually believe in the need to defend himself or herself against imminent peril to life or great bodily injury. (*Viramontes*, *supra*, 93 Cal.App.4th at p. 1262.) "To require instruction on either theory, there must be evidence from which the jury could find that appellant actually had such a belief." (*Ibid.*) Thus in *Stitely, supra,* 35 Cal.4th 514, the court properly refused instructions on perfect or imperfect self-defense where there was no substantial evidence that the defendant was in *actual* fear of *imminent* harm. (*Id.* at p. 552.) In *Oropeza*, instructions on self-defense and imperfect-self-defense were properly denied in the absence of evidence suggesting that the defendant fired shots out of fear. (151 Cal.App.4th at p. 82.) Similarly, where a "defendant did not testify as to any apprehension or danger he may have felt" and no other witness testified that he "acted out of reasonable fear," there was "no substantial evidence of perfect self-defense" to support an instruction in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1102 (*Hill*). A different result was reached in *Viramontes* based on an entirely different record—if the defense witnesses in *Viramontes* were believed, the jury "could find appellant

had an actual belief that he was in imminent peril and that lethal force was necessary to defend himself against the person who shot at him." (*Viramontes*, at p. 1263.)

Simply put, there is no substantial evidence here that would support a perfect or imperfect self-defense instruction here. Even if jurors accepted that Thinn and Lyle engaged in a mutual struggle—despite the come-from-behind strangulation and lack of marks on Lyle's hands—there is no evidence from which jurors could make a reasonable, as opposed to speculative, finding as to Thinn's state of mind when he strangled Lyle. That Thinn called for help *after* Lyle was unconscious does not suggest otherwise. Likewise, evidence that a sheriff's deputy was surprised at Thinn's placement given his race does not support a nonspeculative finding that Thinn reacted in perfect or imperfect self-defense. "Speculative, minimal, or insubstantial evidence is insufficient to require an instruction" on either theory. (*Simon*, *supra*, 1 Cal.5th at p. 132; *Hill, supra,* 131 Cal.App.4th at p. 1101.) On our record, no instructional error occurred.

3. *Cumulative Error*

Thinn argues that the cumulative effect of the court's evidentiary and instructional errors deprived him of due process. Having rejected both claims of error, "there is no cumulative prejudice to evaluate." (*People v. Lopez* (2018) 5 Cal.5th 339, 371.)

DISPOSITION

The judgment is affirmed.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.